Did Baron von Munchausen ever visit Aarhus?

Jans, J.H.

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Did Baron von Munchhausen ever Visit Aarhus?

Some Critical Remarks on the Proposal for a Regulation on the Application of the Provisions of the Aarhus Convention to EC Institutions and Bodies[1]

Jan H. Jans

I Introduction

Karl Friedrich Hieronymus, Baron von Munchhausen, was a German nobleman who served in the Russian army against the Turks, and supposedly told a number of outrageous tales about his adventures. According to the stories, the Baron's astounding abilities included riding cannonballs, travelling to the moon, and pulling himself from the ocean by his own bootstraps. Baron von Munchhausen, the celebrated liar, once told of falling into a bog. When he had sunk up to his neck, and the situation seemed desperate, he said he simply grabbed his own hair and pulled himself out of the bog.

At the Environmental Council meeting of 20 December 2004, the Council reached political agreement, with Belgium indicating its intention to vote against and Germany its intention to abstain, on a draft European Parliament and Council Regulation on the application of the provisions of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention) to the European Community institutions and bodies.[2] After finalisation in all Community languages, the text will be formally adopted at a forthcoming Council meeting as a Council common position.

Reading its provisions[3], in particular those on legal standing, I cannot suppress a comparison with the Baron's stories. Did the Council try, in Articles 10 to 12 of the proposal, to pull itself out of the *Greenpeace*-bog? Let me try to explain.

II Background of the Problem

The complicated problems regarding *locus standi* at the Court of Justice challenging acts of the European institutions are well documented.[4] The cause of all this? The requirement of Article 230(4) EC Treaty of *direct and individual concern*, as it has been interpreted by the ECJ since many years.[5]

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1 Commission, COM (2003) 622 of 24 October 2003 and Common Position of 20 December 2004, Interinstitutional File 2003/0242 (COD) .

2 Press Release 15962/04 (Presse 357), of the 2632nd Council Meeting (Environment) at Brussels, 20 December 2004.

3 For my analysis I used the text of the Common Position of 20 December 2004, Interinstitutional File 2003/0242 (COD) as well as the Commission's proposal (n. 1 above). The text of Title IV of the proposal and the draft common position are reproduced in the Annex to this contribution.

4 See for instance Birgit Dette, "Access to Justice in Environmental Matters; A Fundamental Democratic Right", in: Marco Onida (ed.): *Europe and the Environment. Legal Essays in Honour of Ludwig Krämer,* (2004) Groningen: Europa Law Publishing, p. 3.

5 Case 25/62 *Plaumann* (1963) ECR 95.

The leading environmental case on the admissibility of interested third parties trying to annul decisions of the institutions affecting the environment is still the *Greenpeace* case.[6] As far as the *locus standi* of the organization Greenpeace was concerned, the Court of Justice upheld the view of the Court of First Instance that an association formed for the protection of the collective interests of a category of persons could not be considered to be directly and individually concerned, for the purposes of Article 230 EC Treaty. Although the CFI, in the *Jégo-Quéré* case[7], tried to change this restrictive attitude, the Court itself made it abundantly clear, in its judgment in case *Unión de Pequeños Agricultores* v. *Council*[8], that any changes should be the result of amending the EC Treaty.[9]

In a previous Avosetta-contribution I suggested the ECJ's invitation to amend the text of Article 230 EC Treaty to be followed by deleting the words "and individual" in the text of Article 230.[10] However, the Commission considered an amendment of Article 230 and the establishment of a right of access to justice in environmental matters for every natural and legal person not to be "a reasonable option".[11] Instead, the Commission proposed to limit legal standing to environmental organisations at European level, which meet a number of conditions – the so called "qualified entities". Others affected by breaches of environmental law by Community institutions should not be able to benefit from the proposed Regulation. According to Article 12 of the Commission's proposal only "legal" persons were eligible for being recognised as a qualified entity. Individuals, "natural" persons stayed in the dark. Although the concept of "qualified entities" have been dropped in the Council's common position it is clear that only a "non-governmental organisation" is entitled to make a request for an internal review (Article 11 Common Position). So, maybe Greenpeace is in, but the fishermen in the *Greenpeace* case are still out. Therefore, let us have a closer look to what is proposed in the draft Regulation.

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6 Case C-321/95P *Greenpeace* v. *Commission* (1998) ECR I-1651.

7 Case T-177/01 *Jégo-Quéré* (2002) ECR II-2365.

8 Case C-50/00P *Unión de Pequenos Agricultores* v. *Council* (2002) ECR I-6677.

9 See in particular *Union de Pequenos* (n. 8 above) , para. 45: "While it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force."

10 See Jan H. Jans, "EU Environmental Policy and the Civil Society", in: Jan H. Jans (ed.) *The European Convention and the Future of European Environmental law,* (2003) Groningen: Europa Law Publishing, p. 53.

11 See Commission (n. 1 above), p. 16.

III Access to Justice and the Proposal for a Regulation

On access to justice the Commission's proposal provided for a three tier-approach. First, Article 12 and 13 contained criteria and the procedure for the creation of so called "qualified entities". Secondly, according to Article 9(1), any qualified entity who considered that an administrative act is in breach of environmental law was entitled to make a request for "internal review" to the relevant Community institution. And thirdly, according to Article 11(1), qualified entities not satisfied with the results of the internal review procedure may institute proceedings before the Court of Justice to review the legality of that. So the key elements in the Commission's proposal were: the creation of qualified entities, establishing an internal review procedure, and finally access to the Court of Justice. The Council's common position changed this three-tier approach in a two-tier approach: instead of creating "qualified entities" by way of Commission decision, the common position just stipulates the criteria for non-governmental organisations in order to be eligible to make a request for internal review.

So, would it, after the coming into force of the Regulation, still be necessary to amend Article 230(4) EC Treaty? The proposed Regulation ensures adequate legal protection against decisions of the European institutions in environmental matters, or does it not?

A close look at the provisions of the proposal for a Regulation raises more questions than provides answers. Let us run through the text of it and highlight just some of the queries and potential problems.

The internal review procedure

According to Article 10(1) of the common position, the internal review procedure is open to allow challenges to "administrative acts" and omissions to take such an act. The concept of an "administrative act" was defined in Article 2(1)(h) of the Commission's proposal as meaning: "any administrative measure taken under environmental law by a Community institution or body having legally binding and external effect." This text was clearly unsuitable, because of its ambiguity. Firstly, neither the concept of an "act" or "measure" is known in EC law. So, what is an "act" or "measure"? Did this text mean that the procedure was in principle open for legal protection against directives, regulations and decisions alike? But if that was the case, what did the limitation to "administrative" mean? This notion was not defined at all! Arguably it aimed to exclude directives and regulations because of their legislative nature. But what about secondary and tertiary regulations/directives made by the Commission exercising delegated powers from the Council? Were these to be regarded as "legislative" acts or not? In this respect, we must also take into account the fact that the concept of "legislative acts" will get a very particular meaning in the Treaty

establishing a Constitution for Europe.[12] It is therefore of some importance to know if the draft Regulation is intended to align its provisions with the concepts used in the new Constitution or not.

Well, the Council's common position made things much clearer indeed. Firstly, it defined "administrative act" "as any measure of *individual* scope under environmental law, taken by a Community institution or body, and having legally binding and external effect" (emphasis added). By just inserting the word "individual" the Council made it clear that only "decisions' are subject to the internal review procedure. Secundary and tertiary directives and regulations and of course all framework directives and regulations, they are all excluded.

Furthermore, Article 2(2) of the proposed regulation makes it clear that not even *all* decisions are subject to the internal review procedure. Excluded are also measures taken by a Community institution or body in its capacity as an administrative review body such as under:

- Articles 81, 82, 86 and 87 EC Treaty (competition rules);
- Articles 226 and 228 EC Treaty (infringement proceedings);
- Article 195 EC Treaty (Ombudsman proceedings);
- Article 280 EC Treaty (European Anti-fraud Office proceedings).

The use of the words "such as" clearly indicate the non-exhaustive character of the list, which of course triggers the question of what is meant by "its capacity as an administrative review body". It is in particular questionable to see the Commission's decisions in the area of competition law on the same footing as its role in infringement proceedings. Can one really say that, in the area of competition law, the Commission is acting in an administrative "review" capacity? In my view the Commission is only exercising decision-making competences like in any other area where it possesses decision-making authority. What makes a decision of the Commission applying competition rules in individual case so significanty different from any other decision it can take? One could even ask if it is necessary at all to exclude decisions related to the application of the competition rules. The common position restricts the internal review procedure to administrative acts "under environmental law". The Commission's proposal just spoke of "an administrative act" without the restriction "under environmental law". When we look at the definition of "environmental law" in Article 2(1)(f) of the common position we notice the following: ""Environmental law" means Community legislation which, irrespective of its legal base, contributes to the

[12] See Article I-33 of the Treaty establishing a Constitution for Europe in particular. See on the meaning of the notion "legislative act" in the Constitution Article I-33 (1) , 4th subparagraph: "A European regulation shall be a non-legislative act of general application for the implementation of legislative acts and of certain provisions of the Constitution. It may either be binding in its entirety and directly applicable in all Member States, or be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods".

pursuit of the objectives of Community policy on the environment according to the Treaty establishing the European Community: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems". Can one really say that the Treaty rules on competition law contribute to the pursuit of the environmental objectives of the EC? And what about the rules on structural funds, agriculture, fisheries, industrial policy, development aid, etc. etc. If it was not the intention of the Council to significantly restrict the scope of the internal review procedure, why on earth did it include in Article 10(1) of its common position the term "under environmental law"?

And why did the Council exclude *expressis verbis* its role under the infringement proceedings? Is it not standard case law[13] of the ECJ that those decisions do not have any legally binding and external effect and would therefore already be excluded, if one looks at the definition in Article 2(1)(g) of the proposed regulation?

Article 10(1) opens the internal review procedure to challenge acts of "Community institutions and bodies". Article 2(1)(c) gives the following definition of the phrase: "any public institution, body, office or agency established by, or on the basis of, the Treaty establishing the European Community except when it acts in a judicial or legislative capacity."

On the one hand, this definition is very broad indeed, as it does not limit the review procedure to the traditional institutions mentioned in Article 7 of the EC Treaty. Any organ of the EU will be covered by this. But the limitation to non-judicial and non-legislative capacity is less clear. Probably, activities of the Commission in infringement-proceedings – Article 226 EC Treaty – must be regarded as "judicial", but that is already excluded in Article 2(2) of the proposed regulation. And as far as directives and regulations are concerned, they are excluded because of the requirement in Article 2(1)(g) of "indvidual" measures. There would also be some sense in excluding *general* State aid schemes. The Commission's decision to approve general State aid has a more normative character than approving individual State aid and could therefore being labelled "legislative" in nature.[14] But, any State aid decision has already been excluded in Article 2(2) of the proposed regulation. It does not make sense to exclude the same decision twice, so once again, what does "except when it acts in a judicial or legislative capacity" really mean?

The internal review procedure was, according to the Commission's proposal (Article 9(1)), related to "a breach of environmental law". Environmental law

[13] E.g. case 48/65 *Lütticke* v. *Commission* (1966) ECR 19.

[14] For instance, would a qualified entity be entitled for internal review of the Commission's decision not to approve Italian State aid in case T-176/01 *Ferriere Nord SpA*, judgment of the CFI of 18 November 2004, not yet reported.

was defined in Article 2(1)(g) and "means any Community legislation which has as its objective the protection or the improvement of the environment including human health and the protection or the rational use of natural resources." That sounds very nice and broad indeed. The problem was of course that most of Community environmental law does not contain any such obligation at all for the European institutions. Instead, the more specific and concrete environmental standards – in Directives and Regulations – are directed to the Member States.

Of course, the institutions are bound by the general environmental principles in Article 174(2) EC Treaty[15] and their obligation under the integration principle[16] of Article 6 EC Treaty to integrate these principles "into the definition and implementation of the

Community policies and activities". But we also know how much latitude the ECJ leave to the institutions in meeting their obligations under the Treaty and that the intensity of judicial review exercise by the ECJ is rather low.[17] And we could not assume that the institution, under the text of the Commission's proposal was required in the internal review procedure to exercise not just a "marginal" or "discretionary" review, but a "full" or "merits" review. The text was not clear on that either. So the Commission's proposal raised the pertinent question of what are the legal standards in order to assess if the institutions have breached environmental law or not and how intense should this review be?

Suprisingly, the already lamentable text of the Commission's proposal was even worsened by the Council. In its common position any reference to a standard of review is omitted! Article 10 of the Council's common position just states the entitlement to an internal review procedure, without mentioning the applicable standards for such a review. Therefore, it is now completely unclear when a request for internal review is substantiated of not. This makes the duty for the Community institution to "consider any such request" an empty shell. And it makes the right of the Community institution not to consider a request if the request is "clearly unsubstantiated" a *carte blanche* to disregard any request.

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[15] Case C-284/95 *Safety High Tech* (1998) ECR I-4301 and case C-341/95 *Gianni Bettati* (1998) ECR I-4355, para. 34: "That provision thus sets a series of objectives, principles and criteria which the Community legislature must respect in implementing environmental policy."

[16] See on the integration principle in particular Nele Dhondt, *Integration of environmental protection into other EC policies; legal theory and practice,* (2003) Groningen: Europa Law Publishing.

[17] Case C-341/95 (n. 15 above) , para. 35: "However, in view of the need to strike a balance between certain of the objectives and principles mentioned in Article 130r and of the complexity of the implementation of those criteria, review by the Court must necessarily be limited to the question whether the Council, by adopting the Regulation, committed a manifest error of appraisal regarding the conditions for the application of Article 130r of the Treaty". Cf. Gerd Winter, "The Legal Nature of Environmental Principles in International, EC and German Law", in: Richard Macrory (ed.) *Principles of European Environmental Law,* (2004) Groningen: Europa Law Publishing, p. 10-28.

IV Access to Justice

As the saying goes, "The proof of the pudding is in the eating". So does the proposed Regulation indeed bring about an improvement in the legal protection of interested parties seeking judicial review of acts of the European institutions breaching environmental principles?

As a preliminary remark, we must notice that in the Commission's proposal object of the proceedings before the ECJ is not the initial "administrative act" but the decision in response of the request for internal review. According to Article 11 of the Commission's proposal it was for the qualified entity to challenge the substantive and procedural legality of *that* decision. But once again the text was unclear on what are the environmental standards to be applied by the ECJ.

Once again, the Council managed to deteriorate the text significantly. Article 12 of the Council's common position now reads: "The non-governmental organisation which made the request for internal review according to Article 9 may institute proceedings before the Court of Justice in accordance with the relevant provisions of the EC Treaty." Indeed, "may institute proceedings", but is the original administrative act challenged or the decision of the institution taken in the internal review procedure? Although one may assume that it one has to challenge the decision taken in review, the current text is not clear at all. By the way, this unclarity can trigger some rather awkward procedural complications. It is (is it?) conceivable that the initial decision is challenged directly at the Court under Article 230 EC by those who are "directly and individually"[18] concerned, whilst, at the same time the act is being reviewed according to Article 10 of the Regulation. It is also not quite clear to what extent parties with opposite interests can participate in this review procedure[19] and what constraints the principle of legal certainty will bring about.

Even more serious, though, is, my second observation. According to the Commission's proposal qualified entities could institute proceedings before the ECJ "in accordance" with Article 230(4) EC Treaty. The problem with that is of course that this provision still requires that the applicant must be "direct and individually" concerned by the decision.

And what did the Council do in its common position? It stuck its head in the sand. It replaced "in accordance with Article 230(4) EC Treaty" with "in accordance with the relevant provisions of the EC Treaty". However, the problem does not disappear by not addressing the problem. So the question still remains: how can secondary EC legislation broaden the scope of Article 230(4) EC Treaty? In case C-50/00P,[20] the ECJ explicitly argued that:

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[18] For instance by individuals not having access to the internal review procedure.

[19] My guess is that they can not participate. In any case, the Regulation should have addressed this point.

> "according to the system for judicial review of legality established by the Treaty, a natural or legal person can bring an action challenging a regulation only if it is concerned both directly and individually" and that a broader "interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the Community Courts."

And the Court concluded that, of course, it was possible to envisage a different system of judicial review of the legality of Community measures. But that it would be for the Member States in accordance with Article 48 EU Treaty, to reform the system currently in force.

Let us take the *Greenpeace* case as an example. Would the proposed system imply that Greenpeace could have asked the Commission for internal review of its decision to grant financial aid for the building of the electricity plants on the Canary Islands? And if the Commission decision is insufficient to ensure compliance, would Greenpeace have standing at the Court under Article 230(4) EC? Like the story of the Baron von Munchhausen to pull himself out of the bog, I can hardly believe this. If Greenpeace was not affected by the initial Commission decision in the first place, how can they be affected in an individual manner in the second place by the decision taken in the review procedure?

V Concluding Remarks

So what do I believe? My view is that the proposed Regulation will create an internal review procedure. That is some good news. However, the scope of the internal review procedure is severely limited. Only (some) individual decisions are subject to it and the procedure is only accessible for non-governmental organisations. Furthermore, the proposed Regulation lacks any substantive standard to be applied in the internal review procedure. Furthermore, it is highly unlikely that the Regulation, when formally adopted, will be capable of broadening the scope of Article 230(4) EC beyond the current case law of the ECJ.

At best, the ECJ will accept actions of non-governmental organisations for annulments of decisions taken during the internal review procedure, but only in so far such an action seeks to safeguard the prerogatives of qualified entity in such an internal review procedure[21]: has there been a fair hearing of the complaints and other due process type of arguments? But I am afraid that the Court will leave at that.

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[20] See footnote 8 above.

Maybe my analysis is too sombre, but the ambiguities in the text of the proposed Regulation have the inherent danger that the Regulation, once adopted, will not bring about the desired results. In my opinion it would be still necessary, in particular in view of the *UPA* case, to amend the text of Article 230(4) EC Treaty. The Treaty establishing a Constitution for Europe, however, did change this provision (Article III-365(4)):

> "Any natural or legal person may, under the conditions laid down in paragraphs 1 and 2, institute proceedings against an act addressed to that person or which is of direct and individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures."

But this new provision will not enhance significantly *locus standi* in environmental matters either. As a main rule the concept of "individual concern" still stands. Only with respect to a "regulatory act" – a notion not being defined at all in the Constitution![22] – the requirement of "individual concern" is being dropped, under the proviso that these regulatory acts do not entail "implementing measures". Well, most environment related acts of the institutions do require implementing, particular at the level of the Member States. Whatever the correct interpretation of the term "regulatory act" might be, it is in my opinion quite clear that the decision of the Commission in the *Greenpeace* case cannot be considered such an act. As it is hardly conceivable that Article III-365 (4) of the Constitution will be subject to change at the next round of Treaty amendments, I guess we should start getting familiar with the idea that legal protection in environmental matters is still not regulated satisfactorily in the European Union.

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[21] See for parallel case law: case 70/88 *European Parliament* v. *Council* (1990) ECR I-2041, were the European Parliament – under the old Article 230 EC – was admissible in action for annulment "provided that the action seeks only to safeguard its prerogatives and that it is founded only on submissions alleging their infringement" (para. 27) .

[22] Arguably, it refers to the concept of the "European regulation" defined in Article I-33 of the Constitution: "A European regulation shall be a non-legislative act of general application for the implementation of legislative acts and of certain provisions of the Constitution. It may either be binding in its entirety and directly applicable in all Member States, or be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."

Annex

Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies

Article 9

Request for internal review of administrative acts

1. Any qualified entity who has legal standing according to Article 10 and who considers that an administrative act or an omission is in breach of environmental law is entitled to make a request for internal review to the Community institution or body that has adopted the act or, in case of an alleged omission, should have acted.

Such request must be made in writing and within a time limit not exceeding four weeks after the administrative act was adopted, or, in the case of an alleged omission, four weeks after the date when the administrative act was required by law. It shall specify the alleged breach of environmental law as well as the content of the review decision sought.

2. The Community institution or body referred to in paragraph 1 shall consider any such request, unless the request is clearly unsubstantiated. It shall issue as soon as possible, but no later than twelve weeks after receipt of the request, a decision in writing on the measure to be taken to ensure compliance with the environmental law, or on its refusal with regard to the request. The decision shall be addressed to the qualified entity that has made the request; it shall explain the reasons for the decision.

3. Where the Community institution or body is unable, despite due diligence, to take a decision on a request for internal review within the period mentioned in paragraph 2, it shall inform the qualified entity which made the request as soon as possible and at the latest within the period mentioned in that paragraph, of the reasons for not being able to take that decision and when it intends to decide on the request.

4. The Community institution or body shall take a decision on a request for internal review, considering the nature, extent and gravity of the breach of the environmental law within a reasonable time frame, but not exceeding eighteen weeks from receipt of the request. It shall immediately inform the qualified entity of its decision on the request.

Article 10

Legal standing

A qualified entity shall be entitled to make a request for internal review according to Article 9, without having a sufficient interest or maintaining the impairment of a right, provided that:

a) it is recognised in accordance with Articles 12 and 13, and

b) the subject matter in respect of which a request for internal review is made is covered by its statutory activities.

Article 11

Proceedings before the Court of Justice

1. Where the qualified entity which made a request for internal review according to Article 9 considers that a decision by the Community institution or body in response to that request is insufficient to ensure compliance with environmental law, the qualified entity may institute proceedings before the Court of Justice in accordance with Article 230(4) EC Treaty, to review the substantive and procedural legality of that decision.

2. Where a decision on a request for internal review made according to Article 9 has not been taken by the Community institution or body within the period mentioned in that Article, the qualified entity may institute proceedings before the Court of Justice in accordance with Article 232(3) EC Treaty.

Article 12

Criteria for recognition of qualified entities

In order to be recognised, a qualified entity shall comply with the following criteria:

a) It must be an independent and non-profit-making legal person, which has the objective to protect the environment;

b) it must be active at Community level;

c) it must have been legally constituted for more than two years and, during that period, have been actively pursuing environmental protection according to its statutes;

d) it must have its annual statement of accounts for the two preceding years certified by a registered auditor.

In order to be considered as active at Community level, where a qualified entity is active in the form of several co-ordinated associations or organisations with a structure that is based on membership, those associations or organisations must cover at least three Member States.

Article 13

Procedure for recognition of qualified entities

1. The Commission shall adopt the necessary provisions to ensure an expeditious recognition of a qualified entity where it meets the criteria set out under Article 12.

These provisions shall provide either for recognition on a case by case basis ("ad hoc") or advance recognition for a specified future period.

2. The Commission shall examine, at regular intervals, whether the conditions for recognition continue to be fulfilled.

Where a qualified entity no longer satisfies the criteria in Article 12, the recognition shall be cancelled. Notice shall be given to the qualified entity concerned at least one month before the decision is taken. The decision shall state the reasons for the cancellation.

[Provisional Council Common Position]

Proposal for a Regulation of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies

TITLE IV
INTERNAL REVIEW AND ACCESS TO JUSTICE

Article 10
Request for internal review of administrative acts
1. Any non-governmental organisation which meets the criteria under Article 10 is entitled to make a request for internal review to the Community institution or body that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act.
Such a request must be made in writing and within a time limit not exceeding four weeks after the administrative act was adopted, notified or published, whichever is the latest, or, in the case of an alleged omission, four weeks after the date when the administrative act was required. It shall state the grounds for the review.
2. The Community institution or body referred to in paragraph 1 shall consider any such request, unless the request is clearly unsubstantiated. It shall state its reasons in a written reply as soon as possible, but no later than twelve weeks after receipt of the request.
3. Where the Community institution or body is unable, despite due diligence, to act in accordance with paragraph 2, it shall inform the non-governmental organisation which made the request as soon as possible and at the latest within the period mentioned in that paragraph, of the reasons for its failure to act and when it intends to do so.
The Community institution or body shall act within an overall timeframe not exceeding eighteen weeks from receipt of the request.

Article 11
Criteria for entitlement at Community level
1. A non-governmental organisation shall be entitled to make a request for internal review according to Article 9, provided that:
a) it is an independent non-profit-making legal person according to a Member State's national law or practice;
b) it has the primary stated objective to promote environmental protection in the context of environmental law;
c) it has existed for more than two years and is actively pursuing its objective as referred to under (b);
d) the subject matter in respect of which the request for internal review is made is covered by its objective and activities;
2. The Commission shall adopt the provisions which are necessary to ensure a transparent and consistent application of the criteria mentioned in paragraph 1.

Article 12

Proceedings before the Court of Justice

1. The non-governmental organisation which made the request for internal review according to Article 9 may institute proceedings before the Court of Justice in accordance with the relevant provisions of the EC Treaty.

2. When the Community institution or body fails to act in accordance with Article 9 (2) the nongovernmental organisation shall be entitled to institute court proceedings under the relevant provisions of the EC Treaty.